Supreme Court, U.S.
FILED
JUL 14 1992
OFFICE OF THE CLERK

92-437

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRANCISCO J. LUGO
PETITIONER

v.

RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANCISCO J. LUGO
2201 Robin
McAllen, TX 78504
(512) 630-5640

QUESTION PRESENTED

Does the alleged failure of a *pro se* Petitioner to order a transcript, when in fact no trial or hearing was held and no transcript existed or could be produced, constitute harmless error, entitling Petitioner to continue with the processing of the appeal on its merits?

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TABLE OF AUTHORITIES CITED

STATUTES

Federal Rules of Appellate Procedure, Rule 10(c) . . 3, 6

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

Francisco J. Lugo, Petitioner

v.

Richard L. Thornburgh, Attorney General of the United States, United States Department of Justice, Immigration and Naturalization Service, Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Francisco J. Lugo, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit dismissing

Petitioner's claim for relief from Respondent's violations of Title VII of the Civil Rights Act of 1964 due to an alleged failure to order the transcript.

OPINIONS BELOW

The unpublished Order of the Court of Appeals appears in Appendix A to this Petition. The unpublished Order of the District Court for the Southern District of Texas, McAllen Division appears in Appendix B to this Petition.

JURISDICTION

The Order of the Court of Appeals in this matter was filed on February 28, 1992. A timely Motion to Reinstate the Appeal was filed on March 4, 1992. The Court of Appeals' denial of the Motion to Reinstate the Appeal was issued on April 15, 1992 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Appellate Procedure, Rule 10(c), **Statement of the evidence or proceedings when no report was made or when the transcript is unavailable**

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served upon the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

Rule 42, Fifth Circuit Rules of Appellate Procedure, **Dismissing Cases**

> 42.3.1.2. **Appeals without counsel.**
>
> The Clerk shall issue a notice to appellant that upon the expiration of 15 days from the date thereof the appeal may be dismissed for want of prosecution unless prior to that date the

default is remedied. If the default is remedied within that time the Clerk shall not dismiss the appeal. If the default is not remedied within that time the Clerk may enter an order dismissing the appeal for want of prosecution.

Rule 61, Rules of Civil Procedure, **Harmless Error**

The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE

The United States District Court, Southern District of Texas, McAllen Division, had jurisdiction over Petitioner's claims pursuant to Title 42, U.S.C. § 2000e-5. A complaint was filed with that Court on August 27, 1990, alleging that Respondents had violated Petitioner's Civil Rights by constructively terminating Petitioner's employment based upon his national origin. The District Court ordered Petitioner's claim dismissed by Order filed August 13, 1991, based upon a finding that it lacked jurisdiction and that the

Petitioner had failed to state a claim upon which relief could be granted. A timely petition of review was filed with the United States Court of Appeals for the Fifth Circuit on October 10, 1991. The Court of Appeals dismissed the appeal on February 28, 1992 for the alleged failure of the Petitioner to order the transcript within the time fixed by the rules of the Court. A Motion to Reinstate the Appeal was filed by the Petitioner on March 4, 1992. On April 15, 1992, the Court of Appeals dismissed said Motion.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an important issue of federal law that does not appear to have been previously addressed squarely by the Court; and the Order of the Court of Appeals represents a significant departure from the accepted and usual course of judicial proceedings.

Inasmuch as no trial or hearing was held in the

dismissal of Petitioner's case on Summary Judgement by the District Court, no transcript was or could have been produced. Under those circumstances, it is not clear that Petitioner has any obligation to order a transcript. This is supported by the language of the standard notice sent to the parties following the filing of an appeal with the Court of Appeals, which states that the court reporter must be contacted "**(i)f** there was a trial or hearing . . ." [Emphasis added][1] Rule 10(c) of the Federal Rules of Appellate Procedure, which governs statements of evidence or proceedings when no report was made or when the transcript is unavailable, provides that an " . . . appellant **may** prepare a statement of the evidence or proceedings from the best available means . . .", but does not require the preparation of such a statement. [Emphasis added]

Notwithstanding the foregoing, it is clear that

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[1] Notice of the Court to Petitioner, Appendix E.

Petitioner did in fact contact the Court Reporter on numerous occasions and attempt to order the transcript, but the order forms were returned by the Court Reporter because no trial or hearing had been held.[2] After receiving notice from the Clerk of the Court of Appeals that the case would be dismissed if the transcript was not ordered within fifteen days, Petitioner again brought the matter to the attention of the Court Reporter by letter dated November 11, 1991. No response from the Court Reporter was received, and Petitioner assumed that, based upon the earlier assurances of the Court Reporter, no further action was required.[3]

The Rules of the Fifth Circuit Court of Appeals do not **mandate** that cases wherein Petitioners are not represented by counsel be dismissed for failure to strictly

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[2] *See* Affidavit of Petitioner, Appendix D, and Transcript Order Forms, Appendix F.

[3] *See* Letter from Petitioner to Court Reporter, Exhibit G, and Affidavit of Petitioner, Exhibit D.

adhere to the procedures of the Court.[4] It is clear that the Court has broad discretion in that regard. Even assuming, *arguendo*, that Petitioner was solely responsible for the failure to order a transcript that did not exist, such failure clearly could not affect the substantial rights of any party. Pursuant to Rule 61 of the Rules of Civil Procedure, concerning Harmless Error, said error **must** be disregarded.

Denying Petitioner the opportunity to seek redress on the merits of his claims due to an inconsequential technicality that could not in any manner affect the outcome of the case would be a grave injustice.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the Order of the Court of Appeals in

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[4] *See* Rule 42.3.1.2. of the Fifth Circuit Rules of Appellate Procedure.

this matter.[5]

DATED: July 14, 1992

Respectfully submitted,

Francisco J. Lugo

FRANCISCO J. LUGO

Pro Se

[5] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of the issues raised herein.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6119

FRANCISCO J. LUGO,

Plaintiff-Appellant,

versus

RICHARD L. THORNBURGH, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

CLERK'S OFFICE:

Pursuant to Local Rule 42.3, the appeal was duly entered dismissed for want of prosecution for failure of

appellant to order the transcript

within the time fixed by the rules,

this 28th day of February, 1992.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: /s/
Deputy Clerk

FOR THE COURT - BY DIRECTION

DIS-2

U.S. COURT OF APPEALS
FILED
FEB 28 1992
GILBERT F. GANUCHEAU
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

FRANCISCO J. LUGO,	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RICHARD L. THORNBURGH,	*	CIVIL ACTION
ATTORNEY GENERAL OF THE	*	NO. M-90-168
UNITED STATES, UNITED STATES	*	
DEPARTMENT OF JUSTICE,	*	
IMMIGRATION & NATURALIZATION	*	
SERVICE,	*	
Defendants.	*	

ORDER OF DISMISSAL

On this day came on to be considered Defendants' Motion to Dismiss the above-entitled and numbered cause pursuant to Rule 12(b)(1), (2), and (6). Having read and considered the Defendants' motion, the Court finds that it lacks jurisdiction over this suit and that Plaintiff has failed to state a claim upon which relief can be granted.

THEREFORE, IT IS ORDERED that the Defendants' Motion to Dismiss is hereby GRANTED.

SIGNED on August 6th, 1991 at McAllen, Texas.

/s/
UNITED STATES DISTRICT JUDGE

Southern District of Texas
FILED
AUG 13 1991
Jesse E. Clark, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6119

FRANCISCO J. LUGO,

Plaintiff-Appellant,

versus

RICHARD L. THORNBURGH, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

ORDER:

IT IS ORDERED that appellant's motion to reinstate the appeal is DENIED.

This court notified appellant by letter dated November 8, 1991 that the appeal would be dismissed if within 15 days from that date he failed to comply with Fed. R. App. P.

10(b)(1) (requiring order for transcript, or certificate that none would be ordered, to be filed within 10 days of notice of appeal filing, here October 10, 1991); the appeal was not dismissed until February 28, 1992, appellant still not having complied; the motion to reinstate, which indicates appellant received the November 8 letter within a week of its date, advances no good reason for the continued failure to comply, which persists to this date; appellee has opposed the motion.

/s/
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
FILED
APR 15 1992
GILBERT F. GANUCHEAU
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NO. _____

FRANCISCO J. LUGO,
PETITIONER

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,
UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENTS

AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. I am the Petitioner in the above action.

2. On October 24, 1991, I contacted Court Reporter Bill Holloway and explained that I had received

instructions from the Court of Appeals to order a transcript, but was unsure of what the Court was seeking. Mr. Holloway recommended that I fill out the forms to the best of my ability and forward them to him.

3. On October 24, 1991, I sent the Transcript Order forms to Court Reporter Bill Holloway via certified mail, return receipt requested, attached herein as Appendix F.

4. I spoke with Mr. Holloway on October 28, 1991, and asked for his advice and assistance in ordering the transcript. Mr. Holloway stated that there did not appear to be anything to transcribe.

5. I met with Mr. Holloway on November 1, 1991 in Brownsville, Texas, and he reiterated that there was nothing for him to transcribe because there had been no trial or hearing, and returned the forms to me with

hand-written notations on both pages. I explained to him that I wanted to fully comply with the Court's requirements, and was willing to pay all costs associated with the transcript. He told me that I could not order a transcript since there had been no trial or hearing. He also stated that if he needed anything further from me, he would contact me.

6. After receiving a notice from the Clerk of the Court of Appeals, dated November 8, 1991, I forwarded a copy of said notice to Court Reporter Bill Holloway on November 11, 1991 with a request for his assistance, attached herein as Appendix G.

7. I left messages for Mr. Holloway to call me on November 14 and 15, 1991, but he did not return my calls. I assumed that no further action was required on my part due to his earlier assurances.

8. I also spoke with Mr. Holloway on April 3, 1992.

At that time he stated that he was of the opinion that I could not have done anything more to comply with the Court's order, as there was nothing to transcribe because no trial or hearing had been held.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/05/92

Francisco J Lugo

Francisco J. Lugo, Affiant

CIVIL ACTION NO. CA M-90-168

STYLE Francisco J. Lugo vs Richard L. Thornburgh INS

JUDGE Filemon B. Vela

APPEAL NOTICE FILED 10/10/91

COURT REPORTER Bill Holloway

IMPORTANT NOTICE TO PARTIES

_X_ IF THERE WAS A TRIAL OR HEARING, COUNSEL FOR APPELLANT MUST CONTACT THE COURT REPORTER IMMEDIATELY. (RULE 10 FRAP AND LOCAL RULE 14D REQUIRES THIS TO BE DONE W/IN 10 DAYS)

THE COURT REPORTER IS:

Bill Holloway

TO BE COMPLETED BY CLERK

FILING FEE RECEIVED 10/10/91

RECEIPT NUMBER 700473

COURT OF APPEALS FEE 105.00

APPELLANT Francisco J. Lugo

ATTORNEY FOR APPELLANT

Francisco J. Lugo PRO SE

2505 North Bicentennial
McAllen, Texas 78501
(512) 630-5640

ATTORNEY FOR APPELLEE

Paula Offenhauser
Assistant U.S. Attorney
P.O. Box 61129
Houston, Texas 77209

PARTIES NOTIFIED

_X_ NOTICE OF APPEAL FILED

NOTES: 10/10/91 Notice of Appeal Filed

COPIES OF THIS NOTICE ARE BEING FORWARDED TO COUNSEL OF RECORD AND COURT REPORTER.

JESSE E. CLARK, CLERK

BY I. Medrano

DEPUTY CLERK
P.O. BOX 5059
McAllen, Texas 78502

National Association of Letter Carriers
Branch 2130 • Post Office Box 3838 • McAllen, TX 78502

2505 N. Bicentennial
McAllen, Texas 78501-4244

October 24, 1991

Mr. Bill Holloway
P.O. Box 11
Brownsville, Texas 78522

Dear Mr. Holloway:

As per our telephonical conversation, I am sending you the Forms, in which I filled them out to the best of my ability. The needed paperwork such as briefs, legal matters will be handled by:

Mr. T.J. Bonner
President - National Border Patrol Council
29520 Primrose Drive
Campo, CA 92006

HOME: 1-619-478-5145
Fax: 1-619-478-5716

Mr. Holloway, Due to circumstances beyond my control the U.S. Attorneys focused on B-82-318 but such case did not

have the adverse action file (456 pgs.) nor the FBI Transcripts. I do not know what paperwork mr. Bonner will decide to present to the Court.

Going Pro Se, is an experience but for what it's worth I wish to set the record straight. I was accused of something that never happened, Why?

Thank you for your assistance in this matter.

Sincerely,

/s/

Frank Lugo
Vice President
NALC Branch 2130

Enclosure

Certified Mail Receipt P 668 334 949

TRANSCRIPT ORDER

Dist. Ct. No. _____

District of: _____

Notice of Appeal Fld. _____

Short Case Title _____

Court Reporter Mr. Bill Holloway

PART I.

A. Complete one of the following:

___ Transcript is unnecessary for appeal purposes

___ Transcript is already on file in Clerk's office

___ This is to order a transcript of the proceedings heard on the dates listed below. (*Specify exact dates of proceedings*). If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired.

If proceeding to be transcribed was a trial, also check any appropriate box below for special requests; otherwise, this material will *NOT* be included in trial transcripts.

Voir dire ___ ; Opening statement of plaintiff ___

defendant ___ ; Closing argument of plaintiff ___ defendant ___

Jury instructions ___

B. I certify that I have contacted the court reporter and that satisfactory financial arrangements for payment of the cost of the transcript *have* been made. The method of payment will be:

___ Private funds; ___ Criminal Justice Act Funds (Attach copy of CJA Form 24 to court reporter's copy); ___ Other IFP Funds; ___ Advance Payment waived by reporter; ___ U.S. Government Funds; _X_ Other F.J. Lugo

Signature /s/ Counsel for _____

(Print Name) Francisco J. Lugo Telephone 1-512-630-5640

PART II. COURT REPORTER ACKNOWLEDGEMENT

Date transcript order received _____

If arrangements are not yet made, date contact made with ordering party re: financial arrangements _____

Estimated completion date _____

Estimated number of pages _____

___ Satisfactory Arrangements for payment were made on _____

___ Arrangements for payment have not been made. Reason: ___ Deposit not received ___ Unable to contact to ordering party ___ Other (Specify) _____

Date _____

Signature of Court Reporter _____

Telephone _____

DKT-13
(Rev. 6/90)

AO435 (Rev. 1/90)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

TRANSCRIPT ORDER

1. NAME Francisco J. Lugo
2. PHONE NUMBER 1-512-630-5640
3. DATE October 24, 1991
4. MAILING ADDRESS 2505 North Bicentennial
5. CITY McAllen
6. STATE Texas
7. ZIP CODE 78501-4244
8. CASE NUMBER M-90-168
9. JUDICIAL OFFICIAL Judge Filemon Vela

DATES OF PROCEEDINGS

10. FROM _____
11. TO _____

Don't really need this!

12. CASE NAME Lugo Vs IN&S

LOCATION OF PROCEEDINGS

13. CITY McAllen
14. STATE Texas

15. ORDER FOR APPEAL

16. TRANSCRIPT REQUESTED _____

17. ORDER _____

18. SIGNATURE _____

19. DATE October 24, 1991

National Association of Letter Carriers
Branch 2130 • Post Office Box 3838 • McAllen, TX 78502

2505 N. Bicentennial
McAllen, Texas 78501-4244

November 11, 1991

Mr. Bill Holloway
P.O. Box 11
Brownsville, Texas 78522

Dear Mr. Holloway,

I just received this letter from the Appellates. As per our discussion on November 01, 1991 would you be able to assist me relevant to this matter. I will try to call you before Friday, November 15, 1991.

Thank you for your concern and assistance in this matter. Please advise.

Sincerely,

/s/

Frank Lugo
Vice President
NALC Branch 2130

Enclosure

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

November 8, 1991

Mr. Francisco J. Lugo
2505 North Bicentennial
McAllen, TX 78501

No. 91-6119 LUGO v. THORNBURGH
CA M 90 168

Pursuant to Local Rule 42.3 you are hereby notified that upon the expiration of fifteen (15) days from this date, this case will be dismissed by the Clerk for your failure to:

order the transcript as required by FRAP 10 (b)(1) and complete the purchase order form therefor,

make necessary financial arrangements with the court reporter under FRAP 10 (b)(4),

unless within that time you remedy the above default and notify this office that you have done so. Note also that Local Rule 42.3.1.1 provides that the Clerk may refer the matter to the Court for possible disciplinary action against counsel.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/
Deputy Clerk

cc: All Counsel of Record

DIS-1
Rev. 5/87

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NO. _____

FRANCISCO J. LUGO,
PETITIONER

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,
UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENTS

PROOF OF SERVICE

I, Francisco J. Lugo, do swear or declare that on this date, September 5, 1992, pursuant to Supreme Court Rules 29.3. and 29.4., I have served the attached revised PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows :

Nancy L. Abell
Assistant U.S. Attorney
Southern District of Texas
Post Office Box 1671
Brownsville, Texas 78521

Solicitor General
Department of Justice
Washington, D.C. 20530

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/05/92

Francisco J. Lugo

Francisco J. Lugo, Affiant